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In The
Supreme Court of the United States
October Term, 1993

SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION OF AMERICA, ET AL.,

Petitioners,

v.

MARYBETH PETERS, IN HER CAPACITY AS REGISTER OF COPYRIGHT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE MOTION PICTURE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

This amicus brief is filed with the express written consent of the Petitioners and the Respondents.

Motion Picture Association of America, Inc. ("MPAA") has actively participated on behalf of its member companies and approximately 100 producers, syndicators, and distributors of syndicated series, movies and specials in virtually all the legislative, administrative and judicial proceedings involving the

cable and satellite carrier compulsory licensing plans of 17 U.S.C. §§ 111 and 119. The MPAA-represented claimant group is the largest single recipient of the cable and satellite carrier royalties distributed under those plans.

MPAA offers the copyright owners' viewpoint, which is otherwise unrepresented here, to this Court. MPAA's interest as an amicus curiae supporting respondents in this case is two-fold.

First, MPAA supports a narrow interpretation of compulsory licensing plans to allow owners maximum flexibility to license their works in the free marketplace. Second, MPAA supports the uniform and consistent implementation and administration of compulsory licensing plans by the Copyright Office, the agency delegated those responsibilities. 15 U.S.C. § 702.

SUMMARY OF ARGUMENT

Compulsory licenses granted as part of the Copyright Act of 1976 ("the Act"), as amended, 17 U.S.C. § 101 *et seq.* (1988 & Supp. V 1993), limit the exclusive rights granted to copyright owners. As limitations, they are to be construed narrowly. Congress found that satellite carriers, such as Petitioners, should be granted a limited term compulsory license for their retransmission of television station signals during a short transition period before free market conditions would control. 17 U.S.C. § 119.

Petitioners' position seeks to evade that congressional determination by fitting satellite carriers within the definition of "cable system" found in 17 U.S.C. § 111(f), which would allow carriers to enjoy the benefits of a wholly separate compulsory licensing plan. A determination to place satellite

carriers under a different statutory compulsory license after the sunset of the Section 119 license should be made by Congress, not by the courts.

REASONS FOR DENYING THE WRIT

From a copyright policy standpoint, Petitioners have not demonstrated any basis for review by this Court. The copyright law favors free market decisions as the best means of serving the dual purposes underlying copyright law of promoting the development of original works and of making those works widely available to the public. Free market decisions spurred enormous growth in the telecommunications industry since the Copyright Act was enacted. That growth has increased the amount of original programming available as well as new means—including delivery by satellite carriers to home dishes—of transmitting programming to the public.

Petitioners contend that "[b]ecause [Section 119] does not cover the years prior to 1989 and because [Section 119] will expire by its own terms at the end of this year, the availability of the compulsory license contained in § 111 continues to be crucial to satellite carriers." Petition For Certiorari at 5 n.3. No showing has been made, however, that satellite carriers, a group composed entirely of a few large entities, will be unable to obtain authorization to retransmit copyrighted television programming through private licensing arrangements when their Section 119 license sunsets.[1] Nor has it been shown why the courts should thwart the congressional purpose of a transitory compulsory licensing plan for satellite carriers by replacing it with the cable compulsory licensing plan.

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[1] Likewise, any pre-1989 liability questions concerning satellite carrier copyright liability for retransmitted televisions programming could be resolved by private arrangements.

1. Compulsory Licenses Must Be Narrowly Construed

Congress established broad categories of exclusive rights, 17 U.S.C. § 106, "[s]ubject to sections 107 through 120." *Id.* The latter sections restrict those rights by various limitations, among which are several compulsory licensing provisions. *E.g.,* 17 U.S.C. § 111 and § 119. By granting broad rights that "may be subdivided indefinitely and . . . may be enforced separately," Congress anticipated that free market conditions offered the best opportunity to maximize the availability of original works to the public. H.R. Rep. No. 1476, 94th Cong. 2d Sess. 61 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659. The limitations in Sections 107 - 120 of the Act are narrowly drawn exceptions to be applied in those cases where normal free market conditions were perceived not to work.

Because compulsory licensing provisions restrict the rights of owners to exploit their works fully, such provisions have been interpreted narrowly to avoid their overwhelming the rights of owners:

> We begin by noting that the compulsory license provision is a limited exception to the copyright holder's exclusive right to decide who shall make use of his composition. As such, it must be construed narrowly, lest the exception destroy, rather than prove, the rule. Thus we should neither expand the scope of the compulsory license provision beyond what Congress intended in 1909 nor interpret it in such a way as to frustrate that purpose.

Fame Publishing Co., Inc. v. Alabama Custom Tape, Inc., 507 F.2d 667, 670 (5th Cir. 1975); *accord*, *Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir.), *cert. denied*, 409 U.S. 847 (1972).

An expansive reading of the cable compulsory license of Section 111 to allow satellite carriers to enjoy its privileges would frustrate the purposes of that section as well as those of Section 119.

2. The Purpose Behind Creation Of The Cable Compulsory License Does Not Apply To Satellite Carriers

The Section 111 compulsory license for the retransmission of television station programming by cable systems was created to correct a perceived inefficient market situation applicable to cable systems in 1976:

> The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to maintain the basic principle of the Senate bill to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC.

H.R. Rep. No. 1476 at 89. No similar intent can be found in the legislative history of Section 119. H.R. Rep. No. 887, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 5611.

At the time Section 111 was enacted, roughly 3,450 cable systems served approximately 7,700 communities. H.R. Rep. No. 1476 at 88. Individual cable systems offer several hundred different "distant signals," as defined by 17 U.S.C. § 111(f), as well as all television station signals that are local to each cable system. Those numbers, which have grown since Section 111

was enacted, suggest why Congress thought it would be "impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H.R. Rep. No. 1476 at 89.

In contrast, only five satellite carriers (Petition For Certiorari at ii) serve individual consumer households throughout the country. *Id.* at 3. Satellite carriers are owned by large entities and operate on a national level, as compared to the cable situation in 1976 when many cable systems were small, local operations. Satellite carriers do not offer local signals and, as a whole, retransmit approximately 20 different distant signals to their subscribers, according to their latest filings with the Copyright Office. Negotiations for retransmission licenses between a handful of large, national satellite carriers and copyright owners would not pose anywhere near the burden that Congress found negotiations between 3,450 small, local cable systems and copyright owners would pose in 1976.

Further, copyright owners today have the experience of more than 15 years with the cable compulsory license, and five years with the satellite carrier license, and thus are in a better position now to negotiate retransmission rights than would have been possible in 1976. In addition, copyright owners have privately negotiated the rights to retransmit their works with the plethora of *nonbroadcast* channels (*e.g.*, HBO, USA Network, The Family Channel, ESPN, TNT, CNN) that are made available via cable systems and satellite carriers. Using private negotiations to license works on *nonbroadcast* channels has not impeded their proliferation nor their availability to the public.

The major underlying reason for enacting the cable compulsory license in 1976—the perceived burden of negotiating retransmission rights between copyright owners and thousands of cable systems—does not apply to satellite carriers

today. Congress reached the same conclusion in enacting Section 119, which offers a compulsory license to satellite carriers only through the end of this year after which free market negotiations control.

Expanding the scope of the Section 111 compulsory license to include satellite carriers would frustrate congressional objectives in establishing two very different, but limited, compulsory licensing plans. The cable compulsory license was created to solve a perceived problem that does not exist in the case of satellite carriers. There is no reason to expand the cable compulsory license to include a group not affected by a similar problem. Allowing satellite carriers to take advantage of the cable compulsory license would also extend the term during which satellite carriers are covered by a compulsory license beyond the time authorized by Congress in Section 119.[2]

The ruling below that satellite carriers are not entitled to the privileges of the cable compulsory license is fully consistent with the intent of both Section 111 and Section 119.

CONCLUSION

MPAA believes that pre- and post-Section 119 copyright liability of satellite carriers can and should be resolved by private negotiations. Although the negotiations would not be free from all difficulty, they should be no more difficult than other negotiations regarding the use of copyrighted works. Free market negotiations, not compulsory licenses, are the preferred

[2] Congress may, of course, determine to extend the current term of Section 119. Two bills, H.R. 1103 and S. 1485, are currently before Congress proposing extensions. That decision should be made in the legislative arena, not by judicial interpretation of a different statutory provision.

means for licensing copyrighted works under the overall structure of the Act. The licensing plan set for satellite carriers in Section 119 also looks to private negotiations controlling after 1994. That process should be allowed to work.

Petitioners have demonstrated no reason for this Court to replace the congressional plan for giving satellite carriers a transitory compulsory license with one that would, in effect, extend that license long beyond its legislated term under provisions established for a wholly different situation. Accordingly, MPAA urges this Court to deny the petition.

Respectfully submitted,

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